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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 95

MILK TRANSPORT, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission order dismissed, without a hearing, applications for interim and "grandfather" operating rights filed under Section 7(c) of the Transportation Act of 1958 by a motor carrier.

The Statutory Background and Provisions.—Prior to the Transportation Act of 1958, Section 203(b)(6) of the Interstate Commerce Act (49 U.S.C. (1952 ed.) 303(b)(6)) exempted from the certification requirements of the latter Act motor vehicles used in carrying "agricultural (including horticultural) commodities (not including manufactured products thereof)." In 1956, this Court held that fresh and frozen dressed poultry are "agricultural" commodities and not "manufactured" products thereof within the foregoing exemption, and that certificate authority was therefore not required to transport those commodities. *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express,* 351 U.S. 49. The Court stated (p. 54) that "where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of §203(b)(6)"; and that "manufactured" could not be "expand[ed] * * * to include such incidental processing as is involved in dressing and freezing a chicken." Following that decision, several district courts held that various agricultural products which the Commission had previously deemed non-exempt manufactured products were exempt non-manufactured products.[1]

On March 19, 1958, the Commission's Bureau of

[1] *Consolidated Truck Service, Inc.* v. *United States*, 144 F. Supp. 814 (D. N.J.); *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp. 599 (W.D. Wash.), affirmed, 352 U.S. 884; *Premier Peat Moss Corp.* v. *United States*, 147 F. Supp. 169 (S.D. N.Y.), affirmed, 355 U.S. 13; *Frozen Food Express* v. *United States*, 148 F. Supp. 399 (S.D. Tex.), affirmed *sub nom. Akron, Canton & Youngstown R. Co.* v. *Frozen Food Express*, 355 U.S. 6.

Motor Carriers issued Ruling No. 107, which placed various agricultural products in either the "exempt" or the "non-exempt" category. Among the products listed as "non-exempt" were citrus juices; the Commission had held three years earlier, before this Court's decision in the *East Texas* case, *supra,* that such juices were non-exempt, *i.e.,* manufactured. *Watkins Motor Lines, Inc., Interpretation of Certificate,* 64 M.C.C. 455.

In Section 7(a) of the Transportation Act of 1958 (72 Stat. 573), Congress amended the agricultural exemption in Section 203(b)(6) by adding two provisos. It provided that the words "agricultural * * * commodities (not including manufactured products thereof)" (1) "shall include property shown as 'Exempt' in the 'Commodity List' incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as 'Not exempt' "; and (2) that, notwithstanding the foregoing proviso, the words shall not include, *inter alia,* the following eleven agricultural commodities: frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, hemp, imported wool and certain types of domestic wool. 49 U.S.C. 303(b). Section 7(c) of the 1958 Act (72 Stat. 573) provided "grandfather rights" for any person who was in bona fide operation on May 1, 1958, "in the transportation of property for compensation by motor vehicle made subject to the provisions of [the Interstate Commerce] Act by paragraph (a) of this section * * *."

The Facts of this Case.—Appellant is a certificated common carrier by motor vehicle, which is primarily

authorized to transport milk and milk products. Since November 1957 it has from time to time also transported citrus juices. The latter transportation admittedly is not authorized by its certificate.

On December 10, 1958, appellant filed, pursuant to Section 7(c) of the 1958 Act, a grandfather application for a certificate to transport citrus juices and an application for interim authority to do so. It contended that, in view of the court decisions subsequent to the Commission's *Watkins* decision holding that citrus juices are not exempt (pp. 2–3, *supra*), the transportation of citrus juices was within the agricultural exemption on May 1, 1958; and that its transportation of the product on that date therefore constituted a bona fide operation which gave it grandfather rights.

The Commission (Division 1) dismissed the applications without a hearing, on the ground that prior to the critical grandfather date under the 1958 Act, citrus juices were not exempt agricultural commodities under Section 203(b)(6) (J.S. 25–26). The full Commission denied reconsideration (J.S. 27–28).

The appellant then filed a complaint in the district court seeking a reversal of the Commission's order and a direction to the agency to "hear and determine" the applications (J.S. 16). The district court dismissed the complaint (J.S. 24). It held (J.S. 15–24) that the transportation of citrus juices was not given "grandfather" rights by Section 7(c) of the 1958 Act, and that it was accordingly unnecessary to consider whether such juices were exempt agricultural commodities prior to that Act.

ARGUMENT

This case involves a narrow issue relating to the construction of the "grandfather clause" of Section 7(c) of the Transportation Act of 1958, 72 Stat. 573.[2] That clause applies to the carriage of commodities which had previously been exempted from the certification requirements of the Interstate Commerce Act by the agricultural commodity clause of Section 203 (b)(6) of the Act, but which were "made subject" to the Act by Section 7(a) of the 1958 Act. The specific issue is the applicability of the clause to a commodity, citrus juices, which prior to the 1958 Act has been expressly found by the Commission to be "not exempt," but which, under the rationale of several court opinions construing the agricultural exemption with respect to other commodities, allegedly might have been classified as exempt if the issue had ever gone to litigation.

Section 7(a) of the 1958 Act added two provisos to the agricultural commodity clause of Section 203(b)(6), the first of which expressly froze the status of a large number of commodities as "exempt" or "not exempt" in accordance with Ruling 107 of the Commission's Bureau of Motor Carriers issued shortly before the Act was passed. Appellant contends that Section 7(a) "made subject" to the Act all commod-

[2] Of the 950 applications for grandfather rights filed within the 120-day period specified in Section 7(c) of the 1958 Act, nearly 850 have been disposed of. None of these cases involved subsequent court action raising the question presented here, although it is involved in two actions pending in the district courts arising out of Commission suspensions of tariffs filed by persons claiming grandfather rights.

ities which, under a proper interpretation of the prior language, would have been held "exempt" but which were classified as "not exempt" by incorporation of the Commission ruling into the Act. As we show below, however, the district court properly construed the grandfather clause as applying solely to the particular commodities expressly "returned to regulation" (see *infra*, p. 8) by the second proviso added to Section 203(b)(6) by Section 7(a) of the 1958 Act.

1. It is axiomatic that since a "grandfather clause confers a special privilege, * * * [it] is to be held to extend only to carriers plainly within its terms." *Gregg Cartage Co.* v. *United States*, 316 U.S. 74, 83; see also *McDonald* v. *Thompson*, 305 U.S. 263; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299. Moreover, as the district court pointed out (J.S. 19), the granting or withholding of "grandfather" rights is purely discretionary with the Congress. Even if citrus juices had been previously exempt from regulation and were now being brought under regulation for the first time, there was no necessity for Congress to confer grandfather rights upon the carriers of that product. Cf. *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 434. The district court was thus clearly correct in looking first to the language and history of the grandfather clause to determine whether it had any application to commodities other than those expressly referred to in Section 7(a) of the 1958 Act.

In view of the clear legislative history that only the commodities specified in the second proviso were given

grandfather protection (*infra*, pp. 8–9), appellant is per force required to claim that the language of the grandfather clause is so unambiguous as to preclude resort to legislative history. Its argument is that the operative language—"transportation of property * * * made subject to the provisions of [the Interstate Commerce] Act by paragraph (a) of this section"—applies to both of the provisos added to Section 203 (b)(6), and not just to the second. The flaw in this argument is that the first proviso, unlike the second, does not purport to subject any type of previously exempt transportation to Commission regulation. It merely continues the status as exempt or non-exempt of various commodities previously classified by the Commission on the basis of then controlling interpretations of the Act.[3] The first proviso can thus be said to have "made" particular commodities "subject" to the Act only to the limited extent that the commodity was erroneously classified as "not exempt" in the Commission Ruling No. 7 and erroneously confirmed as such by the Congress. Assuming *arguendo* that this interpretation (which would require analysis of the application of the prior language of Section 203 (b)(6) to each of the many products classified as "not exempt" by the Commission) is a possible read-

[3] The Commission's Bureau of Motor Carriers in Ruling No. 107 took cognizance of existing court interpretations of Section 203(b)(6). It did so not only with respect to the particular commodities involved, but also with respect to a number of other commodities which the Bureau considered controlled by these decisions, despite prior unreviewed determinations by the Commission to the contrary. See H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 36–37.

ing of the grandfather clause, it is patently not so clearly correct as to make resort to the legislative history unnecessary or inappropriate.

2. The legislative history of the 1958 Act removes any doubt that the grandfather clause is limited to the particular commodities listed in the second proviso of Section 7(a). The House Report on the bill describes the effect upon the regulatory scheme of the various judicial decisions broadly interpreting the agricultural commodity clause of Section 203(b)(6), and recognizes that "it is conceivable that a considerable number of other commodities will be held to be exempt" (H. Rep. No. 1922, 85th Cong., 2d Sess., p. 17). It then goes on to state (*ibid.*):

> It is important that this trend be halted before the position of the regulated carriers is more seriously impaired. The committee, therefore, recommends a freezing, *with a small rollback*, of the agricultural exemption in accordance with ruling No. 107 * * *. This amendment would halt further expansion of the scope of the exemption, and it would *return to economic regulation* the transportation of frozen fruits, frozen berries, frozen vegetables, coffee, tea, cocoa, hemp, imported wool and certain categories of domestic wool * * *.
>
> Any person engaged on June 1, 1958, in trucking *the aforementioned commodities which are returned to regulation* by this amendment would be entitled upon application to a certificate or permit allowing him, under regulation, to continue hauling the same commodities within the same areas or between the same points. [Emphasis added.]

See also S. Rep. No. 1647, 85th Cong., 2d Sess., p. 23; H. Rep. No. 2274, 85th Cong., 2d Sess., p. 15; 104 Cong. Rec. 15528.

It is thus clear that Congress extended grandfather rights only to the specific commodities whose previously exempt status was expressly rescinded by the second proviso of Section 7(a); and that only these commodities were considered to have been "made subject" to the Act by Section 7(a). Other commodities, including citrus juices, were frozen by the first proviso of Section 7(a) in the "not exempt" category they might otherwise have been able to escape through future litigation. But they were not thereby "returned to regulation" and thus "made subject" to the Act.

3. The other points raised by the appellant require no extended discussion. The present determination is fully consistent with the Commission's uniform interpretation of the grandfather clause of the 1958 Act since its enactment,[4] and nothing in *Inland Motor Freight "Grandfather" Application*, 83 M.C.C. 543 (J.S. 19) is to the contrary. That case, as the court below pointed out (J.S. 21), involved the question whether commodities, otherwise exempt from regulation under the provisos to Section 203(b)(6), lose their exemption when carried in the same vehicle as non-exempt commodities. The case does not suggest

[4] See *Twine and Crude Rubber—Emery Transportation Company*, 311 I.C.C. 226 (Div. 3, 1960); *Various Commodities Between Points and Places in U.S.*, 309 I.C.C. 573 (Div. 3, 1960); *Cooked Vegetables and Juices Between Points in U.S.*, 309 I.C.C. 46 (Div. 3, 1959); *Citrus Fruit Juice to Central and Midwest Territories*, 308 I.C.C. 552 (Div. 3, 1959); *Coffee Beans Other Than Green*, 308 I.C.C. 495 (Div. 3, 1959).

that grandfather rights are to be extended to commodities considered non-exempt both before and after the 1958 amendment. Nor is it relevant that the Commission denied petitioner grandfather rights primarily upon the ground that citrus juices were not exempt from regulation under the pre-1958 language of the agricultural commodity clause. For since the issue whether appellant had grandfather rights is solely one of law, rather than a matter committed to agency discretion, the district court was justified in itself deciding that appellant had no grandfather rights—even though its ground for decision was not that given by the Commission. *Ruth Elkhorn Coals, Inc.* v. *Mitchell,* 248 F. 2d 635, 638, n. 4 (C.A.D.C.); cf. *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U.S. 80, 88.

CONCLUSION

The decision below is correct, and this appeal presents no question warranting plenary review by this Court. The judgment of the district court should be affirmed.

Respectfully submitted.

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